

FILED

OCT 21 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN DOMINGUEZ, a/k/a Sal Sosa,
Gordo and Martin Beltran-Dominguez,

Defendant - Appellant.

No. 04-50373

D.C. No. CR-01-00091-TJH-05

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Submitted October 11, 2005^{**}

Before: T.G. NELSON, WARDLAW, and TALLMAN, Circuit Judges

Martin Dominguez appeals his 272-month sentence, imposed following a guilty-plea conviction for one count of conspiracy to distribute and possess with

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291.

Dominguez contends that the district court improperly enhanced his sentence based on facts not found beyond a reasonable doubt, *see United States v. Booker*, 125 S. Ct. 738, 748 (2005), and he preserved this objection by raising it below. The government contends that there was no constitutional error in his sentencing because Dominguez admitted the facts underlying the four-level sentencing enhancement in his plea agreement and at the change of plea hearing. We disagree.

The admissions made by Dominguez do not establish that he was a leader under U.S.S.G. § 3B1.1(a), which directs the district court to consider the exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. *See* U.S.S.G. § 3B1.1(a), Application Note 4; *see also United States v. Lopez-Sandoval*, 146 F.3d 712, 717 (9th Cir. 1998) (reversing U.S.S.G. § 3B1.1(a) enhancement for lack of evidence that defendant exercised any control or organizational authority over others).

It is unclear from the record whether the district court was relying exclusively on Dominguez's admissions in applying the leadership enhancement, or whether additional facts were considered. Because the admissions during sentencing were insufficient to support the enhancement, and, if additional facts were considered, it would have constituted Sixth Amendment error to enhance the sentence beyond the then-mandatory Guidelines range, we vacate the sentence and remand for re-sentencing pursuant to *Booker*, 125 S. Ct. at 769.

SENTENCE VACATED AND REMANDED.